Supreme Court, U.S.
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No. 98-___ 981160 JAN 19 1999

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In The

# Supreme Court of the United States

October Term, 1998

SAUL NAVAS, et al.,

*Cross-Petitioners,*

v.

JANET RENO, et al.,

*Cross-Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Cross-petitioners, longtime legal permanent residents, are subject to final orders of deportation on the basis of the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Cross-petitioners have sought review of that decision in the court of appeals by direct review as well as in the district court by habeas corpus. The court of appeals held that jurisdiction is proper in the district court under 28 U.S.C. 2241, that its own direct review jurisdiction was repealed and, on the merits, that the Attorney General incorrectly applied Section 440(d) retroactively. The government contends that no court has jurisdiction to review the Attorney General's retroactivity decision and that, if reviewable, the decision is correct. The questions presented are:

1. Whether AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the district courts and the courts of appeals over cross-petitioners' statutory and constitutional challenges to their final deportation orders and, if so, whether AEDPA and IIRIRA violate the Suspension of Habeas Corpus Clause, Article III or the Due Process Clause of the Constitution.

2. Whether AEDPA 440(d) applies retroactively and, if so, whether it violates the Constitution.

## PARTIES TO THE PROCEEDING

Cross-petitioners are Saul Navas and Franklin Henderson. Cross-respondents are Janet Reno, the Attorney General of the United States; Doris Meissner, the Commissioner of Immigration and Naturalization; the Immigration and Naturalization Service (INS); and Edward McElroy, District Director of the INS in New York.

## OPINIONS BELOW

Saul Navas and Franklin Henderson, respondents in *Reno v. Navas*, No. 98-996, refer the Court to the Opinions Below section in Respondents' Brief in Opposition in No. 98-996, filed simultaneously with this cross-petition on January 19, 1999, and to the government's Petition for Certiorari, which was docketed on December 18, 1998.

## JURISDICTION

Cross-petitioners refer the Court to the Jurisdiction section in Respondents' Brief in Opposition to Certiorari in No. 98-996, filed simultaneously with this cross-petition on January 19, 1999, and to the government's Petition for Certiorari, which was docketed on December 18, 1998.

## STATUTES OR OTHER PROVISIONS INVOLVED

Cross-petitioners refer the Court to the Statutes or Other Provisions Involved section in the Petition for Certiorari and Respondents' Brief in Opposition in No. 98-996.

## STATEMENT

Saul Navas and Franklin Henderson conditionally cross-petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit that the court of appeals lacked jurisdiction over their petitions for review. Cross-petitioners Navas and Henderson request that this conditional cross-petition be granted if the Court grants the petition filed by the Solicitor General in *Reno v. Navas*, No. 98-996. Navas and Henderson, however, oppose the grant of that

petition. *See* Respondents' Brief in Opposition, *Reno v. Navas*, No. 98-996 (filed January 19, 1999).

The Board of Immigration Appeals (BIA) issued Navas and Henderson final orders of deportation on March 14, 1997 and March 21, 1997, respectively. Pet. App. 80a, 332a. The BIA based its orders on *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997) (Pet. App. 80a, 332a), in which the Attorney General held that Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1277, applied retroactively to deprive legal permanent residents like Navas and Henderson of statutory eligibility to apply for relief from deportation under Section 1182(c) of the Immigration and Nationality Act (INA).

Navas and Henderson filed both habeas corpus petitions in district court and petitions for review directly in the court of appeals pursuant to 8 U.S.C. 1105a, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. Henderson's habeas petition is still pending in district court. Navas' habeas petition was granted on July 11, 1997. Pet. App. 82a. The district court held that it had jurisdiction over Navas' petition pursuant to 28 U.S.C. 2241, and that Section 440(d) of AEDPA cannot be applied retroactively. Pet. App. 203a-05a. The government appealed.

The court of appeals consolidated the government's appeal from the district court's grant of habeas relief in Navas' case, Navas' and Henderson's petitions for review and the government's appeals from the district courts' grants of habeas relief to Mojica and Yesil (two other immigrants who are also respondents in *Reno v. Navas*). *See* Pet. Br. 14-15. In the consolidated cases, cross-petitioners challenged the BIA's final orders of deportation on the grounds that (1) the Attorney General

erred as a matter of law when she held in *Matter of Soriano* that AEDPA 440(d) applied retroactively to cases pre-dating AEDPA's enactment, and (2) if applicable, Section 440(d) violates the Constitution.

With regard to jurisdiction, cross-petitioners sought judicial review of both their constitutional and statutory claims either in a habeas corpus action in district court or by a petition for review in the court of appeals. The court of appeals dismissed Navas' and Henderson's petitions for review, and held that they are entitled to raise both their constitutional and statutory claims in district court habeas corpus actions. Pet. App. 58a-59a. The court of appeals then affirmed the district court's judgment in Navas' habeas corpus action, holding that Section 440(d) cannot be applied retroactively to bar Navas from Section 1182(c) relief. *Id.*

The government filed a petition for *certiorari* to this Court. The government contends that the court of appeals had jurisdiction on direct review over Navas' and Henderson's constitutional equal protection claims. Pet. Br. 23 ("AEDPA and IIRIRA do not bar a criminal alien from raising a constitutional challenge to a provision of the INA itself in the court of appeals"). It further asserts that jurisdiction over any other claim that is reviewable must lie exclusively in the court of appeals, but contends that no court has jurisdiction to hear cross-petitioners' retroactivity claim. *Id.* The government argues, however, that if Navas' and Henderson's statutory claims were reviewable, review should occur "in the court of appeals on petition for review. . . . [because] [s]uch a construction of the immigration laws would be far more harmonious with Congress's design than is the result reached by the courts of appeals." Pet. Br. 23 n.13. Regarding the merits, the government contends that the Attorney General's conclusion in *Soriano* is correct. Pet. Br. 26.

## REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

In the event the Court grants the government's *certiorari* petition in *Reno v. Navas*, No. 98-996, Navas and Henderson request that this conditional cross-petition be granted as well. The cross-petition is filed as a protective matter to ensure that the Court perceives no impediment to addressing the merits issue if *certiorari* is granted on the circuit court's ruling regarding the retroactivity of AEDPA 440(d). If the Court grants the government's petition to consider the temporal scope of AEDPA 440(d), cross-petitioners would seek affirmance of the Second Circuit's merits ruling regardless of whether jurisdiction over that claim lies in a district court habeas corpus action or in the court of appeals by direct review.

As the government recognizes in its reply brief in *Magaña-Pizano*, the instant conditional cross-petition will present the Court with the Section 440(d) merits issue in both the petition for review and the habeas corpus context. Reply Brief for the Petitioners [INS et al.], *INS v. Magaña-Pizano*, No. 98-836 (pet. for cert. filed Dec. 18, 1998) [hereinafter "*Magaña-Pizano* Reply Br."] 9-10. As the government further acknowledges, *Reno v. Goncalves* is a flawed vehicle for reviewing the temporal scope of Section 440(d) because Goncalves filed only a habeas corpus action. In *Goncalves*, therefore, the Court would reach the merits *only* if it finds that jurisdiction properly lay in the district courts in a habeas corpus action. *Magaña-Pizano* Reply Br. 9-10. Unlike *Goncalves*, this case, along with the instant conditional cross-petition, presents the Court with a complete vehicle for addressing the temporal scope of Section 440(d).

## CONCLUSION

For the reasons stated, in the event the petition for *certiorari* filed in No. 98-996 is granted, this conditional cross-petition should be granted as well.

Respectfully submitted,

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SAUL NAVAS, ET AL., PETITIONERS

*v.*

JANET RENO, ET AL.

*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE CROSS-RESPONDENTS

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## QUESTION PRESENTED

Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 deprived the court of appeals of jurisdiction over cross-petitioners' petitions for review of their deportation orders.

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# In the Supreme Court of the United States

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*ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE CROSS-RESPONDENTS

As explained in detail in our petition for a writ of certiorari in *Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998), cross-petitioners Navas and Henderson are aliens deportable by reason of having been convicted of certain criminal offenses. The INS commenced deportation proceedings against cross-petitioners based on their criminal convictions. In each case, the alien conceded his deportability but applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), however, concluded that each cross-petitioner was ineligible under Section 1182(c) for such relief. The BIA followed the Attorney General's decision in *In re Soriano*, Int. Dec. No. 3289 (BIA Feb. 21, 1997) (98-996 Pet. App. 389a-402a), that Section 440(d) of the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, which amended Section 1182(c) to make aliens convicted of certain criminal offenses ineligible for relief, should be applied in all pending deportation proceedings. See 98-996 Pet. 9-10, 14.

Each cross-petitioner then filed a petition for review of his deportation order in the court of appeals, pursuant to 8 U.S.C. 1105a(a) (1994). Cross-petitioner Navas also filed a petition for a writ of habeas corpus in district court, seeking to invoke its jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241. Cross-petitioners argued that the Attorney General's decision in *Soriano* was wrong as a matter of statutory interpretation, and also that Section 1182(c) violated constitutional equal-protection principles insofar as it had been construed to deny eligibility for discretionary relief from deportation to aliens placed in deportation proceedings in the United States, but not aliens seeking admission to the United States at a port of entry. The district court granted Navas's habeas corpus petition, concluding that it had subject-matter jurisdiction and that the Attorney General's decision in *Soriano* was wrong, and remanded Navas's case to the BIA for the exercise of its discretion under Section 1182(c). The government appealed that decision to the court of appeals, which consolidated that appeal with Navas's and Henderson's direct petitions for review. See 98-996 Pet. 10-11, 14.[1]

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[1] After the district court ruled on Navas's habeas corpus petition, Henderson also filed a petition for a writ of habeas corpus in the district court. No action has been taken on that petition. 98-966 Pet. App. 2a n.5.

On the question of subject-matter jurisdiction, the court of appeals, following language in earlier decisions of the circuit, concluded that (a) Section 440(a) of AEDPA, 110 Stat. 1276-1277, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626, deprived it of jurisdiction over both cross-petitioners' petitions for review; but that (b) the district court did have jurisdiction under 28 U.S.C. 2241 to entertain both Navas's constitutional and non-constitutional challenges to his deportation order. See 98-996 Pet. App. 27a-37a. On the merits, the court of appeals concluded that the Attorney General's decision in *Soriano*, which held that Section 440(d) of AEDPA should be applied to all deportation proceedings pending on or after the time of AEDPA's enactment, was erroneous. *Id.* at 53a-58a. Accordingly, the court of appeals dismissed both cross-petitioners' petitions for direct review, and affirmed the district court's grant of habeas corpus relief to cross-petitioner Navas. *Id.* at 59a, 62a.

The government then filed a petition for a writ of certiorari, asking this Court to review the court of appeals' determination that the district court could exercise jurisdiction under 28 U.S.C. 2241 over cross-petitioner Navas's challenges to his deportation order, as well as the court of appeals' decision on the merits that overturned the Attorney General's construction of Section 440(d) of AEDPA in *Soriano*. In our petition, we explain (at 19-24) that, although neither the district court nor the court of appeals has jurisdiction to review the merits of the Attorney General's decision in *Soriano*, the court of appeals does have jurisdiction to review cross-petitioners' constitutional equal-protection claim, notwithstanding Section 440(a) of AEDPA

and 309(c)(4)(G) of IIRIRA, and therefore that the court of appeals had erred in dismissing cross-petitioners' direct petitions for review, to the extent that they raised that constitutional claim. We also argue that, if (contrary to our submission) the Constitution requires that some court have jurisdiction to review cross-petitioners' non-constitutional claim, that court is the court of appeals, on petition for direct review, and not the district court, on a collateral habeas corpus petition. See 98-996 Pet. 22-24. We note in our petition in this case that related issues of jurisdiction and the merits are presented by the government's petitions for a writ of certiorari in *Reno* v. *Goncalves*, No. 98-835, and *INS* v. *Magana-Pizano*, No. 98-836 (both filed Nov. 18, 1998), and we suggest in our petition that the court hold the certiorari petition in this case for the disposition of the petitions in those cases.

Navas and Henderson now have filed a conditional cross-petition for a writ of certiorari, seeking review of the court of appeals' dismissal of their petitions for review for lack of jurisdiction. They urge the Court to grant their cross-petition if it grants our principal petition (although they urge the Court to deny our petition). They also suggest that, if the Court does grant review in one or more of the three cases currently pending that present the jurisdictional and merits issues arising out of the application of Section 440(d) of AEDPA to pending deportation proceedings, it should grant review in this case, because this case would enable the Court to reach all of those jurisdictional and merits issues.

We now agree with cross-petitioners that, to ensure complete review of the jurisdictional and merits issues, the Court should grant plenary review of both our principal petition and the cross-petition in this case. In

that posture, the Court could decide in this case both whether Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA prevented the court of appeals from taking jurisdiction over the various claims in cross-petitioners' petitions for review, and whether the district court had jurisdiction over the similar claims raised in Navas's habeas corpus petition under Section 2241. In addition, that posture would also ensure that —if the Court were to conclude (contrary to our submission, see 98-996 Pet. 23) that either the district court or the court of appeals had jurisdiction to review cross-petitioners' challenge to the Attorney General's denial of discretionary relief under Section 1182(c)—the Court could than resolve the merits of the reasonableness of the Attorney General's decision in *Soriano*.[2]

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[2] Technically, the court of appeals in this case granted relief only in Navas's case, and not in Henderson's, because it was reviewing only Navas's habeas corpus petition. If, however, this Court were to conclude that jurisdiction was proper over Navas's and Henderson's petitions for direct review filed in the court of appeals to the extent those petitions challenged the Attorney General's denial of discretionary relief based on her decision in *Soriano*, but not over a habeas corpus petition filed in district court raising the same claim, there would be little point in remanding the case to the court of appeals for further consideration of the merits of the *Soriano* issue on the petitions for direct review. The court of appeals has already concluded that the Attorney General's decision in *Soriano* was wrong, and the correctness of that ruling by the court of appeals on the merits would be ripe for this Court's review if the Court concluded that the court of appeals had jurisdiction to consider that question.

The Court conceivably might conclude that Congress had deprived both lower courts of jurisdiction to review *all* constitutional and non-constitutional claims raised by cross-petitioners, as the Ninth Circuit concluded in *Magana-Pizano* v. *INS*, 152 F.3d 1213 (1998), petition for cert. pending, No. 98-836 (filed Nov. 18, 1998). In that situation, the Court would be presented with the necessity

Furthermore, absent the cross-petition, the Court might not have the authority to reverse the court of appeals' dismissal of cross-petitioners' petitions for review and to grant relief on those petitions for review (should the Court disagree with our submissions, and conclude both that the court of appeals had jurisdiction to review the challenges to the Attorney General's *Soriano* decision and that that decision was wrong on the merits). Such an order would grant relief beyond that awarded by the court of appeals, which ordinarily requires a cross-petition for a writ of certiorari. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 119 n.14 (1985). Accordingly, to ensure that the Court has the authority to address all the jurisdictional questions presented in the case, and, if necessary the merits—and also to grant complete relief—both the petition and cross-petition should be granted, and should be consolidated for briefing and argument.

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of addressing the constitutional questions arising from such a complete ouster of jurisdiction. The court of appeals in this case, however, did not reach that constitutional issue because it concluded that district court jurisdiction was present under 28 U.S.C. 2241. We therefore suggest that the Court also grant plenary review in *Magana-Pizano*, because the court of appeals in that case addressed the constitutional issues and held that what it perceived as Congress's total deprivation of judicial review over all of Magana-Pizano's challenges to his deportation order violated the Suspension of Habeas Corpus Clause, U.S. Const. Art. I, § 9, Cl. 2. See 98-836 Pet. App. 9a-19a.

If the Court follows the course we outline here, it might choose to hold our petition for a writ of certiorari in *Goncalves* pending its decision in this case and *Magana-Pizano*, rather than granting plenary review in *Goncalves* as well, as we initially suggested in our petition in *Goncalves*.

It is therefore respectfully submitted that the petition for a writ of certiorari and the conditional cross-petition for a writ of certiorari should be granted, and should be consolidated for briefing and argument.

SETH P. WAXMAN
*Solicitor General*

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**On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF FOR THE CROSS-PETITIONERS

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For the reasons previously stated, conditional cross-petitioners, Navas and Henderson, oppose *certiorari*. In the event the Court grants review, cross-petitioners submit:

1. The government agrees that the instant cross-petition should be granted as well.

2. As the government suggests, the Court should "also grant plenary review in *Magaña-Pizano* [*v. INS*, No. 98-836] because the court of appeals in that case addressed the constitutional issues. . . . " Brief for the Cross-Respondents [Reno et al.] at 5-6 n.2, *Navas v. Reno*, No. 98-1160.

3. As the government suggests, the Court should hold the petition for *certiorari* in *Reno v. Goncalves*, No. 98-835, pending its decision in this case and *Magaña-Pizano*. *Id*.

4. In regard to the government's citation to *LaGuerre v. Reno*, Nos. 98-1954 & 98-2613, 1998 WL 912107 (7th Cir. Dec. 22, 1998), cross-petitioners inform the Court that the Seventh Circuit is currently considering a petition for rehearing and suggestion for rehearing en banc filed on January 22, 1999. On January 27, the court of appeals

issued an order requesting the government to file an answer to the petition by February 10.

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